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NOTES.

DOCTRINE OF DE FACTO DIRECTORS.—The necessity of maintaining the supremacy of the government has led to the universal adoption from early times of the rule that the acts of those actually occupying a public office are valid as to the public.[1] From public officers, including officers of municipal corporations, the step is a short one to officials of private corporations, to whom also applies the inconvenience and impossibility of investigation by third persons into the details of an election. The early cases apply the doctrine to private corporations with little or no discussion of theory, and no distinction is made between public and private corporate officers.[2] But in sustaining the acts of the latter there is not the same public interest, and the *de facto* doctrine

[1]Constantineau, De Facto Doctrine, §§ 3-4.

[2]Baird *v.* Bank of Washington (Pa. 1824) 11 Serg. & R. 411; Hall *v.* Carey (1848) 5 Ga. 239; McCall *v.* Byram Mfg. Co. (1827) 6 Conn. 428.

is generally limited in extent to the necessity on which it rests. The better opinion of judges and text writers seems to be that the doctrine of *de facto* directors differs from that of *de facto* public officers and depends on the rule of ostensible agency,[3] or the right of third parties to disregard the irregularities of internal corporate management.[4] The rule rests on business expediency,[5] and its extent should be measured thereby.

The tests of *de facto* public officers have frequently been resorted to in order to determine who are corporate directors and officers *de facto*,[6] but the decided cases have by now built up an independent body of precedents as to the requirements for *de facto* directors. The existence of a *de jure* office is not generally required,[7] and where more directors are elected than are authorized, all are treated as directors *de facto*.[8] The ineligibility of the man elected is no bar,[9] nor his failure to perform the acts prescribed for taking office.[10] There must be color of election,[11] but the election may be by persons insufficient in number[12] or not qualified to vote,[13] and it is no objection that the

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[3]Umatilla Water Users' Assn. *v.* Irvin (1910) 56 Ore. 414, 108 Pac. 1016; Lovett *v.* German Ref. Church (N. Y. 1851) 12 Barb. 67; see Despatch Line *v.* Bellamy Mfg. Co. (1841) 12 N. H. 205; Wright *v.* Lee (1892) 2 S. D. 596, 51 N. W. 706. Although not technically resting on estoppel, it does so fundamentally, and is often so stated. Kuser *v.* Wright (1894) 52 N. J. Eq. 825, 31 Atl. 397; Matter of Santa Eulalia etc. Co. (1889) 51 Hun 640, opinion in 4 N. Y. Supp. 174; Taylor, Private Corporations (5th ed.) § 189.

[4]See Scanlan *v.* Snow (1894) 2 App. D. C. 137; 2 Machen, Corporations, §§ 1473, 1477.

[5]See *In re* County Life Assur. Co. (1870) L. R. 5 Ch. *288; Moses *v.* Tompkins (1888) 84 Ala. 613, 4 So. 763.

[6]Baird *v.* Bank of Washington, *supra*; McCall *v.* Byram Mfg. Co., *supra*.

[7]The recognition of a *de facto* officer generally requires the existence of a *de jure* office. 9 Columbia Law Rev., 182.

[8]Werle *v.* Northwestern etc. Co. (1905) 125 Wis. 534, 104 N. W. 743. Where the board is reduced a similar rule applies. Bradford *v.* Frankfort etc. R. R. (1895) 142 Ind. 383, 40 N. E. 741, 41 N. E. 819.

[9]This is true where the persons are not residents, Delaware & Hudson Canal Co. *v.* Pennsylvania Coal Co. (1853) 21 Pa. 131; Copper Belle Min. Co. *v.* Costello (1909) 12 Ariz. 318, 100 Pac. 807, or where they are not stockholders, Steam-Engine Co. *v.* Hubbard (1879) 101 U. S. 188; Jones *v.* Bonanza Min. & Mill. Co. (1907) 32 Utah 440, 91 Pac. 273, unless a statute expressly forbids non-stockholders to act as directors. *In re* Newcomb (1891) 18 N. Y. Supp. 16. Directors may continue in office *de facto* after they have parted with all their stock. Kuser *v.* Wright, *supra*; Robinson *v.* Blood (1907) 151 Cal. 504, 91 Pac. 258.

[10]Omission of filing acceptance, Young *v.* Schenck (1911) 64 Wash. 90, 116 Pac. 588, bonding, Bank of United States *v.* Dandridge (1827) 25 U. S. 64, swearing in, Simpson *v.* Garland (1884) 76 Me. 203.

[11]Hall *v.* Carey, *supra*; Franco-Texan Land Co. *v.* Laigle (1883) 59 Tex. 339.

[12]Baird *v.* Bank of Washington, *supra*; Baggot *v.* Turner (1899) 21 Wash. 329, 58 Pac. 212.

[13]Charitable Assn. *v.* Baldwin (1840) 42 Mass. 359; People *v.* Northern R. R. (1870) 42 N. Y. 217; but see Exline-Reimers Co. *v.* Lone Star Life Ins. Co. (Tex. Civ. App. 1915) 171 S. W. 1060. The doctrine that officers chosen by *de facto* officers are officers *de jure* is generally discredited. 12 Columbia Law Rev., 265.

meeting was irregular as to place, time, or lack of the required notice.[14] The important thing is that the person should act as an officer and have the reputation of being such with the acquiescence of the corporation.[15]

It is in determining the validity of the acts of *de facto* directors that the difference from *de facto* public officers becomes important. All courts agree in holding the corporation bound by the action of the *de facto* officers in favor of third persons, such as the making of deeds, mortgages, and promissory notes.[16] Their actions are valid in litigation by or against third parties.[17] But the validity of their acts in favor of the corporation[18] or the directors themselves[19] is generally denied. Opposed to this is the strict view, brought over from the rule of public officers, that *de facto* directors may be impeached only on direct proceedings.[20] But such proceedings would be ineffective to protect the stockholders and lawful officers, even after judgment of ouster,[21] and equity has interfered by injunction to prevent the

[14]The meeting may be held in a foreign state, Franco-Texan Land Co. *v.* Laigle, *supra*; Ohio & Miss. R. R. *v.* McPherson (1864) 35 Mo. 13, or after the designated day, Burr's Exr. *v.* McDonald (1846) 44 Va. 215, or without the requisite notice. Merchants' Nat. Bank *v.* Citizens' Gas Lt. Co. (1893) 159 Mass. 505, 34 N. E. 1083.

[15]Johnston *v.* Jones (1872) 23 N. J. Eq. 216; Mechanics Nat. Bank *v.* Burnet Mfg. Co. (1880) 32 N. J. Eq. 236; Orr Water Ditch Co. *v.* Reno Water Co. (1882) 17 Nev. 166, 30 Pac. 695; Waterman *v.* Chicago & Iowa R. R. (1892) 139 Ill. 658, 29 N. E. 689.

[16]Gleason *v.* Canterbury etc. Ins. Co. (1906) 73 N. H. 583, 64 Atl. 187, deed, Burr's Exr. *v.* McDonald, *supra*; Werle *v.* Northwestern etc. Co., *supra*, mortgage, Kuser *v.* Wright, *supra*; Hamilton Tr. Co. *v.* Clemes (1897) 17 App. Div. 152, 45 N. Y. Supp. 141, affd. (1900) 163 N. Y. 423, 57 N. E. 614; Copper Belle Min. Co. *v.* Costello, *supra*, notes, Savage *v.* Ball (1864) 17 N. J. Eq. 142; Merchants' Nat. Bank *v.* Citizens' Gas Lt. Co., *supra*; Barrell *v.* Lake View Land Co. (1898) 122 Cal. 129, 54 Pac. 594.

[17]Service may be made on *de facto* officers, McCall *v.* Byram Mfg. Co., *supra*; and they may file an answer, Mechanics Nat. Bank *v.* Burnet Mfg. Co., *supra*, or dismiss an appeal. Young *v.* Schenck, *supra*.

[18]Richards *v.* Attleborough Nat. Bank (1889) 148 Mass. 187, 19 N. E. 353. But a corporation can sue on a promise for which the consideration is the obligation of the *de facto* officers. Cahill *v.* Kalamazoo Mut. Ins. Co. (Mich. 1845) 2 Dougl. 124. Between third parties the acts of *de facto* officers are valid. Cooper *v.* Curtis (1849) 30 Me. 488; Baggot *v.* Turner, *supra*.

[19]Shellenberger *v.* Patterson (1895) 168 Pa. 30, 31 Atl. 943. The doctrine is sufficient to bring *de facto* directors under the disabilities, see Stetson *v.* Northern Inv. Co. (1898) 104 Iowa 393, 73 N. W. 869, and statutory liabilities of directors. Steam-Engine Co. *v.* Hubbard, *supra*; Hudson *v.* J. B. Parker Machine Co. (1899) 173 Mass. 242, 53 N. E. 867.

[20]Commonwealth *v.* Smith (1863) 45 Pa. 59; Atlantic T. & O. R. R. *v.* Johnston (1874) 70 N. C. 348; Modstock Min. Co. *v.* Harris (1902) 40 Nova Scotia 336; Young *v.* Schenck, *supra*. On direct proceedings, by *quo warranto* or under a statute, *de facto* existence is not recognized. People *v.* Albany & S. R. R. (N. Y. 1869) 55 Barb. 344.

[21]Actions of *de facto* officers are valid up to the time the judgment of ouster is filed. Mining Co. *v.* Anglo-California Bank (1881) 104 U. S. 192; but see Walker *v.* Flemming (1874) 70 N. C. 483, and have been held so even after judgment. Zearfoss *v.* Farmers etc. Institute (1893) 154 Pa. 449, 26 Atl. 210, 211. A statute ousting an officer automatically may destroy his *de facto* as well as *de jure* status. Cupit *v.* Park City Bank (1899) 20 Utah 292, 58 Pac. 839.

action of *de facto* directors where some ground for equitable jurisdiction is found.[22] Although the doctrine has been applied in controversies between rival claimants,[23] there seems no necessity for it and the better view is expressed by the recent case of *Stratton-Massachusetts Gold Mines Co.* v. *Davis* (Mass. 1916) 111 N. E. 375, in which *de facto* directors were denied the right to sue *de jure* directors in tort.[24] The doctrine should not be applied to questions of internal management and it would seem, in spite of a respectable array of authority to the contrary,[25] that the calls and subsequent forfeiture of stock by *de facto* directors cannot be enforced against a stockholder[26] unless the stockholder has estopped himself from denying the directors' title.[27] The necessity on which the rule depends requires that it apply only in favor of third persons[28] dealing with the corporation in ignorance of the defects in the directors' election,[29] but it must be admitted that it has not always been so limited.

ENFORCEMENT OF AGREEMENTS TO SUPPORT AGED GRANTORS.—The attitude of the courts towards grants of all or a large part of an old man's property, in return for the grantee's promise to support him in his declining years, stands out as a strong refutation of the criticism that our legal system holds slavishly to precedent and technicalities. Though the law abhors a forfeiture, and it is a general rule of property that words will be construed most strictly in order to avoid divesting an estate,[1] it is eqally well settled that contracts to support aged or infirm grantors, in consideration of a conveyance of property to the obligor, who is generally a relative or very near friend, belong to a peculiar class to which different rules are applicable.[2] Almost without exception,[3] it

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[22]See Johnston *v.* Jones, *supra*; Moses *v.* Tompkins, *supra.*

[23]Commonwealth *v.* Smith, *supra*; Atlantic T. & O. R. R. *v.* Johnston, *supra.*

[24]*Accord,* Ellsworth Woolen Mfg. Co. *v.* Faunce (1887) 79 Me. 440, 10 Atl. 250.

[25]Ohio & Miss. R. R. *v.* McPherson, *supra*; Steinmetz *v.* Versailles etc. Co. (1877) 57 Ind. 457; San Joaquin Land etc. Co. *v.* Beecher (1894) 101 Cal. 70, 35 Pac. 349; Jones *v.* Bonanza Min. & Mill Co., *supra.*

[26]People's Mut. Ins. Co. *v.* Westcott (1860) 81 Mass. 440; Moses *v.* Tompkins, *supra*; Schwab *v.* Frisco Min. & Mill. Co. (1900) 21 Utah 258, 60 Pac. 940; Garden Gully etc. Co. *v.* McLister (1875) 1 App. Cas. 39.

[27]Schenectady etc. Co. *v.* Thatcher (1854) 11 N. Y. 102; Macon & Augusta R. R. *v.* Vason (1876) 57 Ga. 314; Faure Elect. etc. Co. *v.* Phillipart (1888) 58 L. T. Rep. N. S. 525.

[28]Savage *v.* Ball, *supra*; Moses *v.* Tompkins, *supra*; State *v.* Curtis, (1874) 9 Nev. 325; Matter of George Ringler & Co. (1912) 204 N. Y. 30, 97 N. E. 593.

[29]Mere knowledge of irregularities in election seems insufficient to bar a plaintiff's right to avail himself of the doctrine. Scanlan *v.* Snow, *supra.* But actual knowledge and participation in the election would appear to bar him. Vestry of St. Luke's Church *v.* Mathews (S. C. 1815) 4 Desauss. Eq. 578.

[1]4 Kent, Comm., *129.

[2]Bruer *v.* Bruer (1909) 109 Minn. 260, 123 N. W. 813; Cree *v.* Sherfy (1894) 138 Ind. 354, 37 N. E. 787; see Brady *v.* Gregory (1912) 49 Ind. App. 355, 97 N. E. 452; Russell *v.* Robbins (1910) 247 Ill. 510, 93 N. E. 324.

[3]Where the grantor stipulates merely for a money annuity, cancelation is denied, but the amount of the annuity is generally declared a lien on the